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## The Duty to Bargain

The legal regulation of the obligation to bargain collectively in both the private and public sectors has two primary thrusts. The first is concerned with the mechanics of negotiations and the requirement that the parties negotiate in good faith. The second concerns the scope of negotiations, i.e., the determination of what subjects the parties must, upon request, negotiate.

### THE OBLIGATION TO NEGOTIATE IN GOOD FAITH

Under the National Labor Relations Act (NLRA) as originally enacted in 1935, it was an unfair labor practice for an employer to refuse to bargain. There was no similar obligation placed on employee organizations and there was no statutory definition of what the duty to bargain entailed. The primary purpose of the NLRA was to get employers to the bargaining table. As the Senate report stated: "The bill . . . leads them [employee representatives] to the office door of their employer with the legal authority to negotiate for their fellow employees. The bill does not go beyond the office door. It leaves the discussions between the employer and the employee, and the agreements which they may or may not make, voluntary."<sup>1</sup> The National Labor Relations Board and the courts, however, soon added certain requirements, such as the duty to meet at reasonable times and to execute in writing any agreement reached. Many of these requirements were subsequently incorporated in Section 8(d) of the NLRA with the passage of the Taft-Hartley Act in 1947. Section 8(d) states that:

to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times, and confer in good faith with respect to wages, hours,

and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.<sup>2</sup>

A substantial number of the public sector collective bargaining statutes contain identical or similar provisions.<sup>3</sup>

### Parties' Representatives

Virtually all the public sector statutes grant employees the right to negotiate through representatives *of their own choosing*. This has been uniformly interpreted to mean that the union has the right to select the individuals who will negotiate with representatives of the employer and that interference with this right by an employer is an unfair labor practice. Thus, the fact that an employer finds one or more of the union's representatives personally objectionable does not ordinarily justify an employer's refusal to negotiate. The Wisconsin Employment Relations Commission made the following comment:

Personal differences arising between the representatives of the parties engaged in negotiations with respect to wages, hours and working conditions of municipal employes do not constitute a valid reason for refusing to bargain in good faith. Both municipal employers and representatives of their employes have the right to designate whomever they choose to represent them at the bargaining table. To allow either or both parties to refuse to bargain with each other because of alleged or actual conflicts between their representatives would be contrary to the intent and purpose of [the act]."<sup>4</sup>

Similarly, the Assistant Secretary of Labor, in a decision under Executive Order 11491, ruled that: "the right to choose its representatives at such discussions must be left to the discretion of the exclusive bargaining representative and not to the whim of management."<sup>5</sup> A good illustration of the scope of this right lies in a recent decision of the Michigan Employment Relations Commission which held that a county board of commissioners was not free to refuse to negotiate merely because the employees' bargaining representative designated *another* union as its bargaining agent, since the bargaining representative was not giving up its right to represent the employees in question.<sup>6</sup> It should be noted, however, that the size of a union's bargaining team, especially where negotiations take place on the clock, is negotiable and that a public employer is within its rights in requesting that the union negotiate over the size of its bargaining team.

While employee organizations thus have broad rights to designate their representatives for the purposes of collective bargaining, this does not generally include the right to include on their bargaining team individuals who are excluded from the bargaining unit on the basis of their supervisory and/or managerial authority. In fact, in many instances public employers would be committing an unfair labor practice if they negotiated with a union bargaining committee that included such supervisory or managerial personnel. In this regard, the Wisconsin Employment Relations Commission in *City of Milwaukee* stated:

The active participation by supervisory employees in the affairs of an employee organization could result in impeding and defeating the primary purpose of the employee organization—that of representing municipal employees in conferences and negotiations concerning their wages, hours and conditions of employment. Since supervisors are the agents of the municipal employer, a municipal employer, by permitting supervisory employees to participate actively, in any manner similar to that described above, in the affairs of an organization representing employees for the purposes set forth in Section 111.70, could, in the proper proceedings, be found to have committed prohibitive practices by interfering, restraining and coercing its employees in the exercise of their rights granted to them under the law.<sup>7</sup>

While both parties have broad rights in terms of selecting their bargaining representatives, the selected representatives must be clothed with sufficient authority to engage in meaningful negotiations. The use of representatives who do not have any power to agree and who must continually check back with their principals constitutes bad faith bargaining. This does not mean, however, that a party's representatives must have authority to reach binding agreements without any need for ratification. To the contrary, both parties in the public sector typically take any tentative agreements back to their principals for ratification. The Michigan Employment Relations Commission stated: "Obviously, the negotiating team must receive instructions from the governing body and submit oral or written reports to it, if its concessions and tentative commitments are to be meaningful. . . . [I]t need not, and probably cannot, be vested with final authority to bind the public employer, since that would seem to involve an illegal delegation of the lawmaking power of the City Council."<sup>8</sup>

### Duty to Supply Relevant Information

An employer has a clear duty to furnish relevant data and information to a union which represents its employees.<sup>9</sup> The courts and the various labor boards have uniformly held that employers are required upon request to



furnish unions with sufficient data with respect to wage rates, job classifications and other related matters in order to permit the union to bargain intelligently, administer the contract, and prepare for negotiations. In this regard it should be noted that the "union is not required to show the purpose of their requested data unless the data appears to be clearly irrelevant."<sup>10</sup> Rather, the burden is on the employer to show that the requested data is not relevant. An employer is not required to necessarily supply the information in the same form requested as long as it is submitted in a manner which is not unreasonably burdensome to interpret.<sup>11</sup>

Related to the duty to supply information is the obligation of an employer to supply financial data upon request if an employer pleads inability to pay higher wages or fringe benefits. As the U.S. Supreme Court has stated in a case arising under the NLRA:

Good-faith bargaining necessarily requires that claims made by either bargainer should be honest claims. This is true about an asserted inability to pay an increase in wages. If such an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy. And it would certainly not be far-fetched for a trier of fact to reach the conclusion that bargaining lacks good faith when an employer mechanically repeats a claim of inability to pay without making the slightest effort to substantiate the claim.<sup>12</sup>

### Unilateral Action

Another constituent part of the duty to bargain in good faith is the requirement that an employer not make unilateral changes in wages, hours or working conditions which are subject to negotiation without first negotiating with the union. Thus, the Connecticut State Board of Labor Relations observed that: "it is well recognized that unilateral employer action upon a matter which is the subject of current collective bargaining between the parties constitutes a failure and refusal to bargain in good faith upon the issue in question."<sup>13</sup> In one case, for example, the Connecticut board held that an employer acted improperly when it unilaterally adopted a new classification plan while negotiations were in progress.<sup>14</sup>

However, once an employer has given the union an opportunity to negotiate over a given proposal and it appears that the parties are at an impasse, the employer is permitted to unilaterally implement the proposal. In upholding the right of a board of education to take such unilateral action, the Connecticut Supreme Court stated that: "it was not the intention of the legislature to permit progress in education to be halted until agreement is reached with the union."<sup>15</sup>

## Overall Obligation to Bargain in Good Faith

Although the courts and the various labor boards are not supposed to sit in judgment concerning the results of negotiations, they do review negotiations to determine whether the parties have in fact negotiated in good faith. What constitutes good faith bargaining has been variously defined. The Connecticut Supreme Court stated in *West Hartford Education Ass'n v. Decourcy*: "The duty to negotiate in good faith generally has been defined as an obligation to participate actively in deliberations so as to indicate a present intention to find a basis for agreement. . . . Not only must the employer have an open mind and a sincere desire to reach an agreement, but a sincere effort must be made to reach a common ground."<sup>16</sup> In determining whether there has been good faith bargaining, the courts and labor boards consider the totality of the parties' conduct throughout the negotiations. Thus, while an employer has a clear right to insist upon a management rights clause,<sup>17</sup> it has been held that an employer's good faith is suspect if it insists on retaining such absolute unilateral control over wages, hours and working conditions that it in effect would require the union to waive practically all of its statutory rights.<sup>18</sup>

A classic example of a case in which the NLRB looked at the totality of conduct is the case of General Electric (GE).<sup>19</sup> GE's approach to bargaining—called Boulwarism—involved several different elements, including the submission of a firm offer on a take-it-or-leave-it basis, a massive communications campaign, and what in effect amounted to an end run to the employees. In finding that this approach to bargaining did not comport with an employer's obligation to negotiate in good faith, the NLRB stated:

a party who enters bargaining negotiations with a take it or leave it attitude violates its duty to bargain although it goes through the forms of bargaining, does not insist on any illegal or nonmandatory bargaining proposals and wants to sign an agreement. For good faith bargaining means more than 'going through the motions of bargaining'. . . . '[T]he essential thing is rather the serious intent to adjust differences and to reach an acceptable common ground'. . . . On the part of the employer, it requires at a minimum recognition that the statutory representative is the one with whom it must deal in conducting bargaining negotiations, and that it can no longer bargain directly or indirectly with the employees. It is inconsistent with this obligation for an employer to mount a campaign, as Respondent did, both before and during negotiations, for the purpose of disparaging and discrediting the statutory representative in the eyes of its employee constituents, to seek to persuade the employees to exert pressure on the representative to submit to the will of the employer, and to create the impression that the employer rather than the union is the true protector of the employees' interests. . . . '[T]he employer's statutory obligation is to deal with the employees thru the union, and not with the union thru the employees.'<sup>20</sup>

It should be specifically noted, however, that it is not ordinarily illegal for an employer to advise its employees of what is occurring at the bargaining table. As one court noted in construing its public sector act: "The act does not prohibit an employer from communicating in noncoercive terms with his employees while collective negotiations are in progress. . . . The element of negotiation is critical. Another crucial factor in these cases is whether or not the communication is designed to undermine and denigrate the union."<sup>21</sup>

### General Bargaining Guidelines

While it is impossible to set forth ironclad rules on how to fulfill the obligation to bargain in good faith, the following general guidelines may be helpful:

1. Select negotiators with meaningful authority to engage in the give and take of negotiations.
2. Provide, upon request, relevant information in a timely fashion.
3. Do not take unilateral action on matters that are subject to negotiations unless and until such matters have been presented to the union's bargaining team and the parties are at impasse on those matters. It should be noted that this prohibition does not apply during the term of an existing collective bargaining agreement under which the employer has specifically or implicitly retained the right to take the action in question.<sup>22</sup>
4. Do not make proposals on a take-it-or-leave-it basis. This does not mean, however, that after a reasonable period of negotiations an employer cannot legitimately state its final position. For example, in *Philip Carey Mfg.*,<sup>23</sup> the NLRB held that an employer did not commit an unfair labor practice when it made a final offer at the eleventh meeting after having participated in the traditional give-and-take of negotiation.
5. Do not communicate proposals to employees until after they have been presented to the union's bargaining team across the bargaining table.
6. Avoid categorical statements such as: "We will never sign a contract."
7. Take good notes at bargaining sessions. Good notes serve a two-fold purpose: (1) they are helpful in reconstructing what actually occurred in negotiations if it is ever necessary to defend against a charge of refusing to bargain in good faith; (2) negotiating notes are often useful in terms of ascertaining the intent of the parties in agreeing to given provisions in the contract. As such, they can be extremely useful in terms of administering the contract and in presenting evidence of the parties' intent in arbitration proceedings. Parenthetically, it should be noted that it is

generally indicative of bad faith bargaining for one party to insist that there be a verbatim transcript of negotiations or that negotiations be tape recorded.<sup>24</sup> As the NLRB stated: "many authorities and practitioners in the field are of the opinion that the presence of a stenographer at [bargaining] meetings has an inhibiting effect. The use of a stenographer or mechanical recorder to create a verbatim transcript does tend to encourage negotiators to concentrate upon and speak for the purpose of making a record rather than to direct their efforts toward a solution of the issues before them."<sup>25</sup> However, nothing prohibits *both* parties from agreeing to have a verbatim transcript of negotiations.

## THE SCOPE OF NEGOTIATIONS

The determination of the scope of negotiations in the public sector is considerably more complex and difficult than in the private sector.<sup>26</sup> As one commentator has observed: "In the private sector the employer's right to design and control the kind and quality of a product he wishes has been relatively unchallenged. In education, many of the demands frequently made in negotiations challenge these same professional prerogatives."<sup>27</sup> Thus, the NEA, in its *Guidelines for Professional Negotiations*, states:

A professional group has responsibilities beyond self-interest, including a responsibility for the general welfare of the school system. Teachers and other members of the professional staff have an interest in the conditions which attract and retain a superior teaching force, in the in-service training programs, in class size, in the selection of textbooks, and in other matters which go far beyond those which would be included in a narrow definition of working conditions. Negotiations should include all matters which affect the quality of the educational system."<sup>28</sup>

Many others, however, feel that such policy matters must be excluded from bilateral collective negotiations. Wellington and Winter, for example, have observed: "The issue is not a threshold one of whether professional public employees should participate in decisions about the nature of the services they provide. Any properly run governmental agency should be interested in, and heavily reliant upon, the judgment of its professional staff. The issue rather is the method of that participation."<sup>29</sup> Wellington and Winter concluded that if the scope of bargaining was not effectively limited, it "would, in many cases, institutionalize the power of public employee unions



in a way that would leave competing groups in the political process at a permanent and substantial disadvantage.”<sup>30</sup> The resolution of this fundamental conflict has occupied the attention of not only state legislatures, but also the various labor boards and courts which are charged with the responsibility of deciding what the parties must negotiate.

Any discussion of the scope of negotiations usually begins with a review of what the applicable statute provides. Rather than spelling out in elaborate detail what subjects are negotiable, virtually all of the public sector statutes define the obligation in generic terms. In fact, most statutes use the same wording found in the NLRA, i.e., the parties are required to negotiate in good faith “with respect to wages, hours and other terms and conditions of employment.” In one case where a teacher bargaining statute referred to only wages and other terms and conditions of employment and made no reference to hours, the court held that the omission “evidences a legislative judgment that teachers’ ‘hours of employment’ determine students’ hours of education and that this is an important educational policy which should be reserved to the board of education.”<sup>31</sup> As a result, the court held that “the length of the school day and school calendar are not mandatory subjects of negotiation.”<sup>31</sup>

In determining the scope of negotiations, then, the initial inquiry is with respect to what falls within the phrase “wages, hours and other terms and conditions of employment.” Under the NLRA, if a subject is deemed to fall within this area, it is considered to be a mandatory subject of bargaining.<sup>32</sup> A mandatory subject of bargaining is defined as a subject over which the parties must negotiate and over which the parties may insist upon to the point of impasse. Among the subjects that have been held to be mandatory subjects of bargaining are pensions, paid vacations, holidays, merit increases, incentives, bonuses, health and accident insurance programs, meal allowances, no-strike clause, management rights clause, severance pay, reporting pay, subcontracting, overtime, premium pay, shift work, and grievance procedures. It is an unfair labor practice for a party to refuse to negotiate over a mandatory subject of negotiation. Moreover, an employer’s sincere belief that a proposal is not a mandatory subject of bargaining is not a valid defense.<sup>33</sup>

Mandatory subjects of bargaining are to be distinguished from permissive and illegal subjects of bargaining. A permissive subject of bargaining is one which a party can legally propose, but which cannot be insisted upon to the point of impasse. Examples include a demand that the other party withdraw an unfair labor practice charge, a proposal that the employer’s last offer be voted upon by the employees prior to any strike occurring, and a proposal that the bargaining unit be expanded to include additional employees not previously covered. An illegal subject of bargaining is one which would be illegal for the parties to include in an agreement, e.g., a union security clause which is contrary to law.



Despite the expansive interpretation of the number of mandatory subjects that fall within the phrase "wages, hours and other terms and conditions of employment," the courts have repeatedly held that the scope of negotiations is not unqualified. Thus, in a recent case the Supreme Court stated that the NLRA "does establish a limitation against which proposed topics must be measured."<sup>34</sup> The most significant limitation is with respect to matters that are deemed to go to the core of entrepreneurial control. In *Fibreboard Paper Products v. NLRB*,<sup>35</sup> Justice Stewart in his concurring opinion noted:

While employment security has thus properly been recognized in various circumstances as a condition of employment, it surely does not follow that every decision which may affect job security is a subject of compulsory collective bargaining. Many decisions made by management affect the job security of employees. Decisions concerning the volume and kind of advertising expenditures, product design, the manner of financing, and sales, all may bear upon the security of the workers' jobs. Yet it is hardly conceivable that such decisions so involve "conditions of employment" that they must be negotiated with the employees' bargaining representative.

In many of these areas the impact of a particular management decision upon job security may be extremely indirect and uncertain, and this alone may be sufficient reason to conclude that such decisions are not "with respect to . . . conditions of employment." Yet there are other areas where decisions by management may quite clearly imperil job security, or indeed terminate employment entirely. An enterprise may decide to invest in labor-saving machinery. Another may resolve to liquidate its assets and go out of business. Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control. Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment. . . . [T]hose management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security should be excluded from that area.<sup>36</sup>

Significantly, other courts and public employee relations boards have accepted the concept that "management decisions which are fundamental to the basic direction of a corporate enterprise" are not mandatory subjects of negotiation. For example, the Michigan Employment Relations Commission has held that it "will not order bargaining in those cases where the subjects are demonstrably within the core of entrepreneurial control."<sup>37</sup> While the

Michigan commission acknowledged that "such subjects may affect interests of employees," it stated that "it did not believe that such interests outweigh the right to manage."<sup>37</sup> As the Connecticut Supreme Court recently stated, "the notion that decisions concerning the 'core of entrepreneurial control' are solely the business of the employer appears to have a special kind of vitality in the public sector."<sup>38</sup>

The New York Public Employee Relations Board (PERB) has adopted a similar approach. In its *New Rochelle School District* decision it held that decisions concerning the number of employees and whether a given service should be curtailed were not mandatory subjects of negotiation: "The determination as to the manner and means by which education service is rendered and the extent of such service is the duty and obligation of the public employer. A public employer should not be required to delegate this responsibility. The decisions of a public employer as to the carrying out of its mission—a decision to eliminate or curtail a service—are not decisions that a public employer should be compelled to negotiate with its employees."<sup>39</sup> The New York PERB further noted that the underlying rationale "was the concept that basic decisions as to public policy should not be made in the isolation of a negotiation table, but should be made by those having the direct and sole responsibility therefor and whose actions in this regard are subject to review in the electoral process."<sup>39</sup>

In *Board of Higher Education of New York City*, the New York PERB held that student membership on a faculty evaluation committee is not a mandatory subject of bargaining. The New York PERB stated that: "the composition of committees that evaluate employees is not a term or condition of the employees being evaluated."<sup>40</sup> In hesitating to allow college teachers to shut out nonfaculty members, the board noted that policy questions about a university's responsibilities "often involved issues of social concern to many groups within the community other than the public employer's administrative apparatus and its employees. It would be a perversion of collective negotiations to impose it as a technique for resolving such dispute and thus disenfranchising other interested groups."<sup>40</sup> Member Joseph Crowley dissented, rejecting what he regarded as the majority's overreliance on transposing an industrial model of collective bargaining into an academic setting. He noted that appointment and promotion matters have traditionally been matters for mandatory negotiation.

In a recent case the Kansas Supreme Court was faced with the task of defining what was negotiable under the Kansas teacher statute which requires the parties to negotiate in good faith "with respect to terms and conditions of professional service."<sup>41</sup> In addition to wages and other economic matters, the court held that negotiations were required over "such things as probationary period, transfers, teacher appraisal procedure, disciplinary procedure, and

resignation and termination of contracts.”<sup>41</sup> On the other hand, the court held that negotiations were not required over “curriculum and materials, payroll mechanics, certification, class size and the use of para-professionals, the use and duties of substitute teachers, and teachers’ ethics and academic freedom.”<sup>41</sup> The court stated that “the key . . . is how direct the impact of an issue is on the well-being of the individual teacher, as opposed to its effect on the operation of the school system as a whole.”<sup>41</sup>

In a case under the New Jersey act, the New Jersey Supreme Court held that a college board of trustees is not required to negotiate over the length of the college year or the placement of vacations since these matters involve major educational policy determinations which traditionally have been the exclusive responsibility of the board of trustees.<sup>42</sup> After noting that the lines concerning what is negotiable “may often be indistinct,” the court stated:

[The lines] drawn by the Burlington Board of Trustees seem to us to have fairly effectuated the legislative goals. It negotiated on the matters directly and intimately affecting the faculty’s working terms and conditions, such as compensation, hours, work loads, sick leaves, personal and sabbatical leaves, physical accommodations, grievance procedures, etc. It declined to negotiate the major educational policy of the calendar though it did make provision in its governance structure for a calendar committee with student, faculty and administration representatives. While, in the interests of sound labor relations, it might well have also discussed the subject with officially designated representatives of the Association, it was under no legal mandate to do so.<sup>43</sup>

In another case the New Jersey Supreme Court held that a school board’s decision to consolidate the chairmanships of two department was predominantly a matter of educational policy and was not, therefore, a term or condition of employment.<sup>44</sup>

### Effect of Statutory Statement of Management Prerogatives

The determination of the scope of negotiations in the public sector does not end with a review of whether a given subject falls within the area of “wages, hours and other terms and conditions of employment.” In many situations, a given topic might very well be deemed to fall within this phrase, but is nevertheless not a subject for mandatory negotiation because of a statutory reservation of management rights or because it conflicts with civil service rules and regulations. The effect of a statutory statement of management prerogatives on the scope of bargaining will be reviewed first.

Because certain matters have been deemed to be vital to the operation of government, many of the public sector statutes specifically exclude

designated managerial prerogatives from the scope of bargaining. This follows the lead of the federal government in Executive Order 11491, which contains the following reservation of management rights:

Management officials of the agency retain the right, in accordance with applicable laws and regulations—

- (1) to direct employees of the agency;
- (2) to hire, promote, transfer, assign, and retain employees in positions within the agency, and to suspend, demote, discharge, or take other disciplinary action against employees;
- (3) to relieve employees from duties because of lack of work or for other legitimate reasons;
- (4) to maintain the efficiency of the Government operations entrusted to them;
- (5) to determine the methods, means, and personnel by which such operations are to be conducted; and
- (6) to take whatever actions may be necessary to carry out the mission of the agency in situations of emergency.

The Hawaii, Kansas and Nevada statutes have similar provisions. Moreover, a number of other states provide that public employers are not required to bargain over certain matters. For example, the Pennsylvania act provides that “public employers shall not be required to bargain over matters of inherent managerial policy, which shall include but shall not be limited to such areas of discretion or policy as the function and programs of the public employer, standards of services, its overall budget, utilizations of technology, the organizational structure and selection and direction of personnel.”

In the past several years the Federal Labor Relations Council (FLRC) and the various state and local labor relations agencies have been called upon to interpret the effect of a statutory statement of management prerogatives on the scope of bargaining. In *Department of the Army Corps of Engineers*,<sup>4,5</sup> the FLRC ruled that a union’s request to negotiate on rotating shift work schedules was negotiable. It rejected the agency’s argument that the union’s proposal would be contrary to the right of management under Section 12(b)(4) of Executive Order 11491: “to maintain the agency of Government operations entrusted to them.” In so ruling, the FLRC stated:

In general, agency determinations as to negotiability made in relation to the concept of efficiency and economy in section 12(b)(4) of the Order and similar language in the statutes require consideration and balancing of all the factors involved, including the well-being of employees, rather than an arbitrary determination based only on the anticipation of increased costs. Other factors such as the potential for



improved performance, increased productivity, responsiveness to direction, reduced turnover, fewer grievances, contribution of money-saving ideas, improved health and safety, and the like, are valid considerations. We believe that where otherwise negotiable proposals are involved the management right in section 12(b)(4) may not properly be invoked to deny negotiations unless there is a substantial demonstration by the agency that increased costs or reduced effectiveness in operations are inescapable and significant and not offset by compensating benefits.<sup>45</sup>

This decision should be contrasted with the FLRC's earlier decision in *Plum Island Animal Disease Laboratory*, wherein it held that "the number of its work shifts or tours of duty, and the duration of the shifts, comprise an essential and integral part of the 'staffing patterns' necessary to perform the work of the agency" and, therefore, was not negotiable since the Executive Order reserved to management the right to determine "the numbers, types or grades of positions for employees assigned to an organizational unit, work project or tour of duty."<sup>46</sup>

The Hawaii act likewise contains a fairly explicit management rights provision. In *Hawaii State Teachers Association and Department of Education*,<sup>47</sup> the Hawaii Public Employee Relations Board held that a proposal concerning the average class size ratio was negotiable despite the employer's contention that this was a managerial prerogative reserved under the statute. In a subsequent decision, however, the Hawaii Public Employment Relations Board ruled that a proposal concerning work load which would fix the maximum number of students per teacher was not negotiable. After noting that the proposal involved "both educational policy-making and has a significant impact on working conditions," the Hawaii board determined "that it so interfere[d] with management's right to establish management educational policy and operate the school system efficiently as to render it non-negotiable."<sup>48</sup> The board's rationale was as follows:

It is our opinion that the specific proposal on work load which is here at issue, while admittedly concerned with a condition of employment because it may affect the amount of work expected of a teacher, nevertheless, in far greater measure, interferes with the DOE's responsibility to establish policy for the operation of the school system, which cannot be relinquished if the DOE is to fulfill its mission of providing a sound educational system and remaining responsive to the needs of the students while striving to maintain efficient operations. Hence, the DOE and the HSTA may not agree to the subject work load proposal because such agreement would interfere substantially with the DOE's right to determine the methods, means, and personnel by which it conducts its operations and would interfere with its responsibility to the public to maintain efficient operations.<sup>49</sup>

In the *State Area College District* case, the Pennsylvania Labor Relations

Board vacillated with respect to the interpretation and application of the management rights proviso set forth in the Pennsylvania act. After initially ruling that some twenty-one proposals, ranging from class size to the elimination of the requirement that teachers chaperone athletic activities, were covered by the proviso and that a school board was not therefore required to negotiate on these matters,<sup>50</sup> the board reconsidered its initial decision and held that many of the twenty-one items which it had previously ruled nonnegotiable were, in fact, negotiable.<sup>51</sup> On appeal, the Commonwealth Court of Pennsylvania ruled that all of the twenty-one proposals in question were covered by the management rights proviso in that they concerned matters of inherent managerial policy. The court, in relevant part, stated:

We must conclude that school boards have traditionally been given by the Legislature, under constitutional mandates, broad inherent managerial powers to operate the public schools and to determine policy relative thereto. If Act 195 represents a departure from the traditional principle of our public schools being operated and managed by school boards, it would be a sharp departure not to be presumed but the result of clear legislative declaration. . . .

Matters of "inherent managerial policy" over which public employers are not obligated to bargain are such matters that belong to the public employer as a natural prerogative or essential element of the right (1) to manage the affairs of its business, operation or activity and (2) to make decisions that determine the policy and direction that the business, operation or activity shall pursue.<sup>52</sup>

The California Meyers-Milias-Brown Act authorizes negotiations over "wages, hours and other terms and conditions of employment," but exempts from the scope of negotiation the "consideration of the merits, necessity, or organization of any service or activity provided by law or executive order." In *County of Los Angeles County Department of Public Social Services v. Los Angeles County Employees Association*,<sup>53</sup> the California Court of Appeals upheld a decision of the Los Angeles County Employee Relations Commission that the number of cases assigned to welfare workers is a working condition and therefore a mandatory subject of bargaining. In balancing the conflicting provisions of the ordinance, the court stated: "The problem of interpreting these sections, and their relationship to each other, is that an argument can plausibly be made that *all* management decisions affect areas of mandatory service to the public *and* the working conditions of public employees; or, conversely, that all decisions rendered concerning a public employee labor dispute of necessity will determine the quality of mandated public service *and* the operation of management."<sup>53</sup> The court noted that it could find no reason why a public employer could not discuss the question of case load in light of "wages, hours and other conditions of employment," even though the

"merits, necessity, or organization" of the service being rendered are excluded from negotiations.

The Nevada Local Government Employee Relations Act contains a fairly lengthy provision which reserves to public employers numerous rights "without negotiation or reference to any agreement resulting from negotiation." In *Washoe County School District*, the Nevada Local Government Employee-Management Relations Board held, *inter alia*, that proposals concerning class size, student discipline, school calendar, and teacher load were nevertheless negotiable. The board held "that any matter significantly related to wages, hours and working conditions is negotiable, whether or not said matters also relate to questions of management prerogative; and it is the duty of the local government employer to proceed and negotiate said items."<sup>54</sup>

### Effect of Civil Service Laws on Scope of Negotiations

Prior to the advent of wide-scale collective bargaining in the public sector, the terms and conditions of employment for many public employees were established pursuant to civil service rules and regulations. In the public sector, these civil service rules and regulations were the counterpart to the collective bargaining agreement in the private sector. The enactment of public sector collective bargaining legislation has raised the question as to the extent, if any, to which preexisting civil service rules and regulations are superseded by collective bargaining. The legislative response has differed from state to state. The Michigan act, for example, is completely silent on the matter. As a result, the parties and eventually the courts have had to attempt to resolve the many conflicts that have arisen. The Michigan Supreme Court, noting that it had "to guess what the 1965 legislature would have done had the point come to its attention," held that the 1965 public employee bargaining law "must be implemented and administered exclusively as provided therein" and that the authority of civil service commissions was "diminished *pro tanto* by the [public employee labor relations] act of 1965, to the extent of free administration of the latter according to its tenor."<sup>55</sup>

On the other hand, some states have provided, in effect, that existing civil service rules and regulations should not be impeded by collective bargaining. For example, the Massachusetts act for municipal employees provides that nothing in the act "shall diminish the authority and power of the civil service commission, or any retirement board or personnel board established by law." The New Hampshire statute for state employees provides, not unlike Executive Order 11491, that "all collective bargaining agreements shall at all times be subject to existing or future laws and all valid regulations adopted pursuant thereto."

The third legislative approach is to provide that certain core essentials of the merit principle—i.e., the holding and granting of merit examinations and the appointment of employees from lists established by such examinations—are not negotiable, but with respect to all other matters where there is a conflict between the collective bargaining agreement and the rules and regulations adopted by a personnel board or civil service commission, the terms of such agreement shall prevail. This approach has been adopted in Connecticut.

The conflict between civil service and the scope of bargaining under public sector collective bargaining laws is clearly revealed in *Laborer's International Union of North America, Local 1029 v. State of Delaware*.<sup>56</sup> At issue was the negotiability of union proposals concerning pay for holiday work, paid union leave, premium pay for double shift work, use of accumulated sick leave for vacation purposes, hazardous duty pay, and reimbursement for accumulated sick leave upon voluntary resignation. The court, noting that the Delaware Public Sector Bargaining Law provides for negotiations on "matters concerning wages, salaries, hours, vacations, sick leave, grievance procedures and other terms and conditions of employment," stated that each of the union's proposals fell within the defined area of negotiations and therefore was a "proper subject for collective bargaining." The court noted, however, that "difficulty arises when one attempts to reconcile the Union's demands for collective bargaining with the provisions and purposes of the State's Merit System of Personnel Administration." After noting that "both the Merit System and the right of public employees to organize are of relatively recent origin," the court stated:

*Having studied the statutes and the available legislative history, I am of the opinion that where there is uncertainty as to areas where the General Assembly has indicated a clear intention to deny collective bargaining, any doubt should be resolved in favor of the merit system. The Merit System has been instituted to create a uniformity of protection and treatment for public employees. The sections listed in section 5938(c) are those in which uniformity of treatment would seem most essential if the system is to have meaning, particularly those which attempt to deal with classification based on ability, equal compensation for commensurate ability and responsibility, promotions and time off from work with pay. If each agency is to bargain with the bargaining representative of its employees on such things as the amount of pay for holidays and double shifts worked, the amount of authorized leave with pay, the use of accumulated sick leave as additional vacation with pay, etc., then the obvious result will be to have employees of the same classifications receiving different compensation and different leave arrangements for different purposes based solely upon the agency they work for and the success of their collective bargaining representatives. Section 5938(c) seems designed to prevent this while the remainder of the statute allows for bargaining on various other matters. I am therefore reluctant to*



expand the scope of collective bargaining so as to effectively encroach upon rules adopted pursuant to the statutes protected by Section 5938(c) without clear legislative direction to do so (emphasis added).<sup>56</sup>

The court noted that: "[its] decision should not be taken to indicate a negative attitude in this State towards the rights of public employees. Rather it is an attempt to reconcile conflicts inherent in a public employment program which contemplates both merit system protection as well as collective bargaining rights for State employees."<sup>57</sup>

An example of the type of conflict that arises is indicated in the decision of the Oregon Public Employee Relations Board in *University of Oregon Medical School and the State Personnel Division*.<sup>58</sup> There the Oregon State Employee Association represented 90 percent of the physical plant employees employed by the state, with the American Federation of State, County, and Municipal Employees representing the remaining 10 percent. When AFSCME requested negotiations with respect to salaries for the physical plant employees which it represented, the personnel division proposed that negotiations on economic matters be conducted jointly with both AFSCME and the Oregon State Employee Association; it refused to negotiate separately with AFSCME on salaries and wages. In this regard, the personnel division relied on a provision of the merit system law which provided that salaries of employees in any classification in the classified state service were to be uniform. In rejecting the contentions of the personnel division, the Oregon board stated:

Even if it be true that the statute requires a single rate, this does not foreclose the obligation to bargain with the smaller unit nor does it force the smaller unit to sit by submissively while the larger group has determined its fate. We cannot catalog all of the possible results of bargaining with the smaller unit but, as examples of possible results, it might be that the smaller unit would be persuaded to accept the pre-set rates or that the Department would agree to some different and higher rates which might then become the standard for all employees. It is also possible that the parties would reach an impasse. It is also conceivable that ORS 240.235(3), while requiring a uniform rate, does not require that the rate be uniform throughout the state but only in geographical areas.<sup>59</sup>

### Effect of Statutes, Charter Provisions and Ordinances

In addition to the conflict between civil service laws and collective bargaining, there is also a conflict with other state statutory provisions, municipal charters, and ordinances. In *Detroit Police Officers Association v. City of Detroit*,<sup>60</sup> one of the questions raised was whether the city of Detroit

was required to bargain with respect to certain changes in the retirement system where such changes were incorporated in a city charter provision which had been approved by the electorator. In holding that the duty to bargain under the Michigan Public Employment Relations Act superseded city charter provisions, the court stated: "It takes little insight to appreciate what a municipal employer and its electorator could do to the collective bargaining process if this procedure were allowed to stand. Any 'Home Rule' city could merely write its pension and retirement system into its charter, and insulate any change therein from negotiations and settlement save with electoral approval. This to us is the exact converse of what the Legislature intended when it inserted bargaining rights for public employees into the statute."<sup>61</sup> Similarly, the Wisconsin Employment Relations Commission (WERC) in *Racine County*, ruled that whether salary increases were retroactive was negotiable, rejecting the employer's contention that retroactive payments were prohibited by a county ordinance. The WERC stated that "what the County enacted with respect to retroactivity, it can repeal if it so desires."<sup>62</sup>

In *Waterbury Teachers Association v. City of Waterbury*,<sup>63</sup> the Connecticut Supreme Court held that a board of education had a duty to negotiate the terms and conditions of employment of principals even though the job specifications of the principals had been established by civil service rules and regulations adopted pursuant to a city charter. The court noted that principals as certified professional employees were covered by the Connecticut Teacher Negotiation Act and that therefore the provisions of the state act mandating negotiations were applicable "notwithstanding ... the Waterbury Charter and the civil service rules and regulations adopted pursuant thereto."<sup>64</sup>

### Effect of Legislative and Appropriation Process

In *Rutgers Council of the American Association of University Professors v. The New Jersey Board of Higher Education*<sup>65</sup> the court held that a state board of higher education did not violate the state's public sector bargaining law when it unilaterally adopted a student-faculty ratio funding formula applicable to the university, notwithstanding the union's contention that the formula imposed certain work loads, class sizes, class hours, etc., on the university's faculty. In so ruling, the court stated:

The Board's right to make a budget recommendation for Rutgers was intended by the Legislature to be exercised freely, and in a manner that would enable it to receive an independent and analytical assessment of the budgetary needs of the University. As respondents point out, if the Employer-Employee Relations Act were construed to compel collective negotiations on the budget recommendations given to the Legislature by the Board, this obvious legislative intent would be

frustrated, for the recommendations it made each year would reflect compromise and not the Board's independent judgment. As we have remarked earlier in this opinion, any member of a public or private interest group may examine any budget recommendation made by the Board and, if so minded, submit his views and appropriate data with regard thereto to the executive and legislative branches of government. This, and not collective negotiation, is the proper avenue for interested parties to follow.<sup>66</sup>

Collective bargaining in the public sector is in many respects at the same stage of development as collective bargaining was in the private sector in the late 1930s. Like the private sector then, the public sector is beset with considerable uncertainty as to what the obligation to bargain in good faith means and what the scope of bargaining is. While much remains to be resolved, it is not unreasonable to suggest that as precedents are established to govern the conduct of the parties at the bargaining table and as the parameters of bargaining become more firmly established, the uncertainty and militancy that often accompanies public sector bargaining today will decrease. That, at least, was the experience in the private sector. I am not suggesting that the problems are easy or that everything will eventually work out satisfactorily for all concerned. I do suggest, that, as the parties become more experienced in their relatively new roles and as institutional changes are made to accommodate to the reality of collective bargaining, the crisis, conflict and confrontation that permeates much of public sector bargaining will begin to recede.

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